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In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

KOHN, INC., THE KOHN BREWERY CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH and PETER ZARICH,
Respondents.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,
Respondents.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

On November 18, 1963, the Court denied the Petition for Writ of Certiorari in the above case.

The filing of this petition for rehearing is impelled by the decision of the Court of Appeals for the Fourth Circuit in *Osborn vs. Sinclair Refining Co.*, decided November 4, 1963 (1963 TRADE CASES, Par. 70,940), which conflicts with the rationale and result of the *Ace Beer* decision of the Court of Appeals for the Sixth Circuit.

Both in the *Ace Beer* case and in the *Osborn* case, the issue before the respective Courts of Appeals was whether damages are recoverable by a private antitrust litigation

where the refusal to deal was in furtherance of unlawful acts, although *not* in furtherance of monopoly, or conduct which has been traditionally a *per se* violation of the antitrust laws, or other "unreasonable" market restraint.

The issue on the appeal in *Osborn* was stated by Chief Judge Sobeloff as follows:

> "* * * when the District Court came to assess damages, it declared that a refusal to deal was not a per se restraint of trade in violation of the Sherman Act unless done in concert with others as part of a conspiracy (as in Klors v. Broadway-Hale Stores, 359 U. S. 207 (1959)) or unless the unwillingness to deal was in furtherance of a monopoly. *In the absence of conspiracy or monopoly, the Court held that no action could be maintained unless the refusal to deal offended the 'rule of reason' i.e., that it constituted an 'unreasonable' restraint of trade in light of all the circumstances of the case.* The District Court recognized, in accordance with our holding, that the tying arrangement was per se unlawful. It further acknowledged that Sinclair's termination of the lease and the sales agreement with Osborn was in furtherance of that unlawful arrangement. *The court nevertheless took the view that because there was in this case no concerted action or attempted monopoly, and because the cancellation was not 'unreasonable', there could be no recovery for the termination of the business relationship.*" (1963 TRADE CASES at p. 78,745, emphasis supplied.)

The ruling of the District Court in the *Osborn* case was reversed by the majority of the Court of Appeals for the Fourth Circuit.

Chief Judge Sobeloff held:

> "* * * no case has been cited to us, and our research has revealed none, holding that a refusal to deal may be immune in spite of the fact that the seller has violated the antitrust laws and that the refusal to deal

was in furtherance of that violation. The cases are unanimously to the contrary. They show without exception that damages may be recovered for a refusal to deal in furtherance of an arrangement condemned by the antitrust laws, whatever form of trade restraint the arrangement takes. *Although most, but not all, of these cases did in fact involve monopoly or conspiracy, as opposed to non-monopolistic or non-conspiratorial arrangements in restraint of trade, the courts made absolutely nothing of any such distinction.*" (1963 TRADE CASES at p. 78,748, emphasis supplied.)

The Court of Appeals for the Fourth Circuit clearly executed the intendment of this Court in its ruling in *Klor's* and *Parke-Davis* that whenever a refusal to deal is in furtherance of an unlawful antitrust objective, *the competitor is entitled to recover for injury to his business and property irrespective of injury to competition.*

By contrast, in *Ace Beer* the Court of Appeals for the Sixth Circuit was concerned *principally with competition, not with the competitor.* The philosophy of the Sixth Circuit refused to encompass the situation of the competitor who was injured by an alleged violation of the antitrust laws in the form of a conspiracy to destroy the competitor in commerce and wrongfully to divert the flow of commerce, where the violation did not encompass injury to competition.

Said the Court:

"The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in dis-

tributors as it was before. See: *United States v. E. I. duPont de Nemours & Co.*, 351 U. S. 377." (Appendix to Petition, pages 32-33.)

> "It is well settled that the 'restraint of trade' referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. * * * (citing cases) The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade. * * * (citing cases)." (Appendix to Petition, page 33.)

The conflict between the Courts of Appeals in the *Osborn* case and in the *Ace Beer* case is deep and pervasive. This conflict goes to the heart of the antitrust remedies of the small businessman under the antitrust laws. Where the philosophy of the Sixth Circuit finds harbor, the rights of the small businessman as plaintiff under the antitrust laws will be very uncertain, if not nullified.

Unless this Court clarifies the status of the competitor following a refusal to deal in furtherance of a violation of the antitrust laws which does not accomplish an unreasonable restraint of competition, the rights carefully enunciated by this Court in Klor's and Parke-Davis will prove to be a mirage to the individual businessman.

There are few private antitrust plaintiffs whose elimination can be said to have an effect or impact upon "competition" in any broad or general sense. This Court has presumably consigned to oblivion the requirement of "injury to competition" as the test of the right of the antitrust plaintiff to sue. In *Radovich*, this Court expressly dispensed with the requirement of pleading "injury to competition." In *Parke-Davis* and *Klor's* this Court both by inference and by express holding eliminated from proof any prerequisite of "injury to competition."

Despite the holdings of this Court, in those Districts and Circuits where the "injury to competition" philosophy prevails, the private treble-damage plaintiff has no standing, irrespective of the reason for the refusal to deal. The case of the private plaintiff has foundered on the "public injury" philosophy irrespective of the reason for the refusal to deal:

1. *Price fixing.* In *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 83. (S. D. Calif., 1961), the Court held that a complaint alleging a refusal to deal pursuant to a boycotting and price fixing combination failed to state a cause of action. The Court stated:

> "The only injury of any kind claimed to issue from defendants' conduct, is the loss to plaintiffs of $15,000 potential profits from the sale of Ames patio furniture." (194 F. Supp. at 89.)

2. *Boycotts.* In *Arzee Supply Corp. of Conn. v. Ruberoid Co.*, 1963 TRADE CASES, Par. 70,851 (D. Conn., July, 1963), the Court held no cause of action was stated under the antitrust laws by allegations that a manufacturer of roofing materials refused to sell to plaintiff as a result of persuasion and coercion by threats of boycotts by a number of its dealers. The Court put the decision upon two grounds:

(a) failure on the part of the pleader to allege a conspiracy between Ruberoid Co. and the coercing dealers; and

(b) citing the ruling of the Sixth Circuit in the *Ace Beer* case, that the amended complaint "fails to allege that the conduct of the conspiring dealers resulted in market control by Ruberoid, or that this conspiracy drove out the products of competitors of Ruberoid or that the refusal of Ruberoid to deal because of the combination of dealers gave Ruberoid the power to exclude actual or potential competition from the field of roofing materials within the given market." (1963 TRADE CASES at page 78,461.)

3. *The Tying Agreement.* The technique whereby a refusal to deal in the interest of an unlawful tying agreement would result in no remedy to the plaintiff is illustrated by Judge Thompson's rulings in *Osborn v. Sinclair Refining Company* at 171 F. Supp. 37 (D. Md., 1959); and 207 F. Supp. 856 (D. Md., 1962). In the first case, the District Court held that no violation of the antitrust laws was stated. The ground for decision was that no injury to competition was proved.

Following remand by the Court of Appeals for the Fourth Circuit (286 F. 2d 832) the District Court again held that damages were not recoverable by Mr. Osborn since the refusal to deal did not work "an unreasonable restraint of trade." (207 F. Supp. 856 at 863.)

It would seem clear from the foregoing that the philosophy of the Court of Appeals for the Sixth Circuit in the *Ace Beer* case *can operate to destroy any remedy for the small businessman under the antitrust laws—irrespective of whether the source of the injury be a per se violation of the Sherman Act or a refusal to deal in the interest of an unreasonable restraint*. For rarely does the elimination of one businessman or one distributor, or one dealer have an effect upon competition adequate to satisfy the requirements of the Court of Appeals for the Sixth Circuit.

Only where the philosophy of antitrust laws prevails in the District Courts and the Courts of Appeals in accordance with the pronouncements of this Court as interpreted and applied by Judge Leahy in *Dorberg v. Dow Chemical Company*, 195 F. Supp. 337 (E. D. Penna., 1963)[1] can the small businessmen find protection from the refusals to deal in the interest of antitrust violations.

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[1] Judge Leahy stated at 195 F. Supp. 344:

"The rule, however, of 'effect upon interstate commerce' laid down in *Klor's Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741, and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. et al.*, 364 U. S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358, is very broad. The Supreme Court has stated the rule to encompass any situation where the use of economic leverage through *group* boycott or *efforts* has been used to limit or close an individual entrepreneur's access to supply or disposition of goods in interstate commerce, or used to foreclose market entry or market operations *regardless of the perceptible market effect*." (Emphasis supplied.)

CONCLUSION.

Unless this Court resolves the patent conflict between the Courts of Appeals for the Fourth Circuit and the Sixth Circuit, the way has plainly been shown to extinguish the civil remedy for most private antitrust suits pursuant to Section 4 of the Clayton Act.

Respectfully submitted,

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Certificate.

MYRON N. KROTINGER hereby certifies that he is a member of the bar of the Supreme Court of the United States; that the within Petition For Rehearing is presented in good faith and not for delay; and that the Petition is restricted to the intervening circumstances of substantial or controlling effect presented by the conflicting ruling of the Court of Appeals for the Fourth Circuit in *Osborn v. Sinclair Refining Co.*, decided November 4, 1963, 1963 TRADE CASES, Par. 70,940.

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